2017 IL App (2d) 170220-U
No. 2-17-0220
Order filed December 29, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLIAM L. FENNELL, Plaintiff-Appellant, v. ROYAL MANAGEMENT CORPORATION d/b/a EASTGATE MANOR; EAST GATE MANOR OF ALGONQUIN, LLC; KATHRYN WOODS; and TOM KAMPTNER, Defendants, (Royal Management Corporation d/b/a Eastgate Manor, Defendant-Appellee.)	)	Appeal from the Circuit Court of McHenry County. No. 16-LA-164 Honorable Thomas A. Meyer, Judge, Presiding

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting the defendant's motion to dismiss was reversed; the plaintiff did not fail to exhaust his administrative remedies, and the trial court had subject matter jurisdiction over the action.

¶ 2 Plaintiff, William L. Fennell, filed this action in the circuit court of McHenry County against Royal Management Corporation d/b/a Eastgate Manor, East Gate Manor of Algonquin, LLC, Kathryn Woods, and Tom Kamptner alleging sexual harassment, retaliation, and retaliatory

discharge. The court dismissed Royal Management Corporation (Royal) from the action pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). Plaintiff appeals. For the reasons that follow, we reverse.

¶ 3 I. BACKGROUND

¶ 4 The following undisputed facts are derived from the record.

¶ 5 From November 2008 through March 2009, plaintiff worked as a maintenance director at an assisted living facility known as Eastgate Manor of Algonquin. The W-2 forms he received indicated that his employer was "Eastgate Manor of Algonquin, L.L.C." A report from the Secretary of State's website, however, identified that company as "East Gate Manor of Algonquin LLC." Despite the discrepancies, the parties appear to agree that the correct legal name of the corporate entity was East Gate Manor of Algonquin, LLC. We will hereinafter refer to that entity as "East Gate."

¶ 6 Royal provides management services for East Gate and other entities. East Gate and Royal have the same registered agent. As Royal acknowledges in its appellate brief, the two companies also have "some mutuality of ownership and directors."

¶ 7 Plaintiff's claims of harassment and retaliation are primarily directed toward his former supervisor, Woods. According to plaintiff, he was fired after reporting Woods's improper conduct to Kamptner, the district supervisor. Plaintiff thereafter submitted a grievance in accordance with his employee handbook, which had been prepared by Royal. Madonna Corbett, Royal's vice president of human resources, responded to that grievance. She informed plaintiff in a letter on Royal's letterhead that, after reviewing his file and conducting "various interviews with Eastgate Manor and Royal Management staff," she had "no choice but to affirm the facilities [*sic*] decision of your termination."

¶ 8 Before an aggrieved employee may commence an action in circuit court stemming from an alleged civil rights violation, he or she must comply with the procedures set forth in the Illinois Human Rights Act (Act) (775 ILCS 5/1-101 *et seq.* (West 2016)). In accordance with the requirements of the Act, plaintiff filed a charge with the Illinois Department of Human Rights (IDHR) alleging six counts against respondent "Eastgate Manor." Although "Eastgate Manor" is not an actual legal entity, Stephen C. Debboli of the law firm of Serpico, Petrosino & DiPiero defended "Eastgate Manor" in the administrative proceedings. According to a document that "Eastgate Manor" filed in the administrative proceedings, it notified the IDHR in October 2009 that its "contact person" was Royal's vice president of legal affairs, John Catanese.

¶ 9 The IDHR initially dismissed plaintiff's charge for lack of substantial evidence to support the allegations. Plaintiff requested review of that decision by the Illinois Human Rights Commission (IHRC). On February 17, 2016, the IHRC sustained the dismissal of one count of plaintiff's charge but reinstated the other five counts, remanding the matter to the IDHR for entry of a finding of substantial evidence. At that point, plaintiff had the option of either continuing the administrative proceedings or commencing a civil action in the circuit court of McHenry County within 90 days. See 775 ILCS 5/7A-102(D)(4) (West 2016); 775 ILCS 5/8-111(A)(1) (West 2016).

¶ 10 Plaintiff exercised the latter option, timely filing suit against, *inter alia*, "Royal Management Corporation d/b/a Eastgate Manor." Debboli filed an appearance as one of Royal's attorneys. Royal immediately moved for summary judgment on the basis that it was not a proper party to the action, insofar as it was neither plaintiff's employer nor the owner or operator of the assisted living facility at issue. The court denied the motion, reasoning that Corbett's letter "affirming" plaintiff's termination suggested that Royal had some control over his employment.

¶ 11 Plaintiff thereafter amended his complaint and added East Gate Manor of Algonquin, LLC as a party defendant. He alleged that East Gate and Royal were his joint employers.[1] Debboli, who had already appeared for Royal, also appeared as one of the attorneys for East Gate. East Gate filed, but later withdrew, a motion to dismiss on grounds that are irrelevant to the instant appeal. Royal filed a separate motion seeking dismissal from the action pursuant to section 2-619 of the Code. According to Royal, because plaintiff never attempted to charge Royal in the administrative proceedings, he failed to exhaust his administrative remedies. In the reply brief in support of its motion to dismiss, Royal maintained that plaintiff's failure to name it as a respondent in the administrative proceedings deprived the court of subject matter jurisdiction over plaintiff's present claims against Royal.

¶ 12 The court granted Royal's motion to dismiss. The court included language making the order immediately appealable pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Plaintiff timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Plaintiff offers numerous reasons why he believes that the trial court erroneously dismissed Royal from the action. According to plaintiff, by initially moving for summary judgment without objecting to the court's jurisdiction, Royal waived its right to challenge jurisdiction in a subsequent motion to dismiss. Plaintiff also contends that when the trial court analyzed whether he had exhausted his administrative remedies, it failed to consider and apply the statutes and administrative regulations relating to misnomer and mistake. Specifically, he argues, irrespective of whether his failure to designate Royal as a respondent in the

[1] Plaintiff eventually filed a second amended complaint, which was identical to the first amended complaint but included exhibits that had been omitted.

administrative proceedings amounted to misnomer or a mistake, he satisfied the requirements to maintain his present action against Royal. Moreover, plaintiff proposes that the court failed to consider that Royal did not obtain permission to proceed in the administrative action under the false name of "Eastgate Manor." Plaintiff similarly asserts that Royal was involved in the administrative proceedings, and that it "misled the Court" by proceeding under an alias or an unregistered assumed name. Plaintiff insists that, by charging "Eastgate Manor" in the administrative proceedings, he exhausted at least one of his administrative remedies. Plaintiff further proposes that Royal's counsel had an ethical duty to correct the false name in the administrative proceedings.

¶ 15 Royal responds by noting that it never disputed the trial court's personal jurisdiction. Instead, it challenged the court's subject matter jurisdiction due to plaintiff's failure to exhaust his administrative remedies. Subject matter jurisdiction, Royal notes, may be challenged at any time. Royal further maintains that, if plaintiff believed that Royal and East Gate were joint employers, "jurisdictionally he was obligation [*sic*] to name them in the Illinois Department of Human [*sic*] Charge." Moreover, Royal asserts that the misnomer and mistake rules "have absolutely no applicability to the facts in this case," because plaintiff never attempted to name Royal in the administrative proceedings. Nor, Royal claims, did it ever submit to the jurisdiction of the administrative proceedings or become a party to those proceedings. Instead, by naming "Eastgate Manor" as the respondent in the administrative proceedings, plaintiff actually named East Gate, which, Royal says, was (1) "a legal viable entity," (2) plaintiff's employer, and (3) the entity plaintiff intended to charge. Royal emphasizes that although East Gate "continu[ed]" plaintiff's mistake of naming "Eastgate Manor" as the respondent in the administrative proceedings, East Gate admitted that plaintiff was its employee and defended the case on the

merits. Accordingly, even if the mistake of naming "Eastgate Manor" rather than East Gate had been discovered during the administrative proceedings, Royal submits that plaintiff would have had no reason to amend his charge to add Royal as a respondent. Royal maintains that there was never any attempt to mislead or deceive plaintiff.

¶ 16 Royal moved for dismissal pursuant to section 2-619 of the Code without citing any particular subsection of the statute. Royal's motion potentially implicated two subsections: (1) "the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction" (735 ILCS 5/2-619(a)(1) (West 2016)) and (2) "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim" (735 ILCS 5/2-619(a)(9) (West 2016)). In ruling on a motion to dismiss pursuant to section 2-619, the trial court must accept as true all well-pleaded facts and construe the pleadings in favor of the non-moving party. *In re Estate of Shelton*, 2017 IL 121199, ¶ 21. We review *de novo* the trial court's order granting the motion to dismiss. *Shelton*, 2017 IL 121199, ¶ 21.

¶ 17 We do not agree completely with either party's arguments, as neither seems to hit the mark. Plaintiff cites section 2-301 of the Code (735 ILCS 5/2-301 (West 2016)) to support that Royal waived its right to contest jurisdiction when it first filed a motion for summary judgment on other grounds. As Royal correctly notes, that provision applies to personal jurisdiction challenges, not challenges to subject matter jurisdiction. See 735 ILCS 5/2-301(a-5) (West 2016) (discussing the circumstances under which a party "waives all objections to the court's *jurisdiction over the party's person*" (emphasis added)). Unlike personal jurisdiction, subject matter jurisdiction is not an issue that may be waived. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 333 (2002).

¶ 18 Further, we disagree that this appeal requires us to consider the rules regarding misnomer and mistake. The distinction between misnomer and mistake matters when a plaintiff attempts to amend a complaint after the statute of limitations has run to add a new party or to correct an existing party's name. See *Guiffrida v. Boothy's Palace Tavern, Inc.*, 2014 IL App (4th) 131008, ¶ 35 (explaining that, in cases of misnomer, "the amended complaint naming the proper defendant is considered filed upon the filing date of the original complaint," whereas in cases of mistaken identity, the amended complaint relates back to the original timely complaint only if certain statutory requirements are satisfied (internal quotations omitted)). Here, plaintiff filed suit in the circuit court of McHenry County within 90 days of receiving his right to sue letter from the IHRC, and he timely sued Royal by its correct name. He thus had no need to amend his complaint after the expiration of the statute of limitations to bring Royal into the circuit court action. Additionally, plaintiff never filed a motion in the administrative proceedings seeking to amend the charge against "Eastgate Manor." Accordingly, this appeal simply does not involve any question of misnomer versus mistake.

¶ 19 Instead, we believe that Royal more accurately frames the issues at hand: "[D]id the Plaintiff fail to exhaust his Administrative Remedies as against Royal Management Corporation; and if so, did the Trial Court lack subject matter jurisdiction over the claim against Royal Management Corporation?" For the reasons that follow, we hold that plaintiff did not fail to exhaust his administrative remedies and that the trial court had subject matter jurisdiction over the action.

¶ 20 Royal cites *Castaneda v. Illinois Human Rights Commission*, 132 Ill. 2d 304 (1989), wherein the supreme court described the exhaustion-of-administrative-remedies doctrine as follows:

> "Parties aggrieved by the action of an administrative agency, such as the Human Rights Commission, ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to them. [Citations.] Requiring the exhaustion of remedies allows the administrative agency to fully develop and consider the facts of the cause before it; it allows the agency to utilize its expertise; and it allows the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary. [Citations.] The doctrine also helps protect agency processes from impairment by avoidable interruptions, allows the agency to correct its own errors, and conserves valuable judicial time by avoiding piecemeal appeals." *Castaneda*, 132 Ill. 2d at 308.

In *Castaneda*, a three-member panel of the IHRC ruled against the plaintiff on his charge of discrimination, and he sought judicial review of that decision without availing himself of the opportunity to seek rehearing before the entire Commission. *Castaneda*, 132 Ill. 2d at 307-08. The supreme court held that, in order to render the administrative decision final and reviewable, the plaintiff was required to exhaust his remedies by seeking an *en bloc* rehearing. *Castaneda*, 132 Ill. 2d at 308.

¶ 21 *Castaneda* is distinguishable, because plaintiff here indeed exhausted his administrative remedies against the named respondent, "Eastgate Manor," and he received authorization from the IHRC to commence an action in the circuit court. Moreover, unlike in *Castaneda*, plaintiff is not a party who is "aggrieved by the action of an administrative agency." *Castaneda*, 132 Ill. 2d at 308. Plaintiff is not seeking administrative review of an adverse decision; he simply exercised his statutory right to proceed in the circuit court once the IHRC reversed the dismissal of five of the six counts of his charge. The policy considerations cited by the court in *Castaneda*—

including avoiding piecemeal appeals and allowing the administrative agency to fully develop the record and correct its own errors—do not apply here.

¶ 22 Royal also cites *Cahoon v. Alton Packaging Corp.*, 148 Ill. App. 3d 480 (1986), *Faulkner-King v. Wickes*, 226 Ill. App. 3d 962 (1992), and *Cooper v. Illinois State University*, 331 Ill. App. 3d 1094 (2002). As an initial matter, our supreme court has sharply criticized these cases. See *Blount v. Stroud*, 232 Ill. 2d 302, 325 (2009) ("The appellate court's holding in *Cahoon* and its progeny is contrary to the clear language of the Act, and the presumption of legislative acquiescence does not apply."). Furthermore, as explained above, our plaintiff indeed brought his claims in the proper administrative forum before filing suit in the circuit court. That distinguishes the matter from *Cahoon* and *Cooper*, wherein the respective plaintiffs attempted to forego proceedings before the IDHR altogether. In *Faulkner-King*, the appellate court noted that it had previously affirmed the IDHR's dismissal of the plaintiff's charge, and the plaintiff was now attempting to file an independent action against her employer for money damages and injunctive relief. *Faulkner-King*, 226 Ill. App. 3d at 963. *Faulkner-King* is thus likewise factually and procedurally distinguishable from the present case.

¶ 23 Royal's exhaustion-of-administrative-remedies argument rests on the assumption that plaintiff was required to explicitly name it as a respondent in the administrative proceedings. In pursuing this defense, Royal fails to account for the very unique facts of this case. Plaintiff timely filed a charge with the IDHR against "Eastgate Manor." Although "Eastgate Manor" was not an actual legal entity, attorney Debboli appeared on behalf of that respondent in the administrative proceedings. Plaintiff apparently did not realize that there was a difference between East Gate and Royal, and that never became an issue until plaintiff filed this action in the circuit court. Although East Gate and Royal are distinct legal entities, they have some

mutuality of ownership, they share counsel (one of their attorneys represented "Eastgate Manor" in the administrative proceedings), and they have the same registered agent. Royal appears to take for granted that, by filing a charge with the IDHR against "Eastgate Manor," plaintiff properly brought East Gate, not Royal, into the proceedings. But just as plaintiff never specifically designated Royal as a respondent in the administrative proceedings, he never specifically named East Gate either. Moreover, the record confirms that Royal was aware of the administrative proceedings, as "Eastgate Manor" informed the IDHR that its "contact person" was Royal's vice president of legal affairs. Under the totality of the circumstances, this is not a situation where plaintiff's complaint ought to be dismissed for failure to exhaust administrative remedies.

¶ 24 Royal further submits that the trial court lacked subject matter jurisdiction over plaintiff's claims against it. Section 8-111(D) of the Act states that "[e]xcept as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." 775 ILCS 5/8-111(D) (West 2016). The trial court here plainly had subject matter jurisdiction over the alleged civil rights violations, as plaintiff received a right to sue letter from the IHRC and he timely filed suit in accordance with the provisions of the Act. Royal seems to believe that subject matter jurisdiction is unique to each party, such that the trial court could have possessed subject matter jurisdiction as to one defendant (East Gate) but not another (Royal). Unsurprisingly, Royal offers no authority to support such a proposition, and it is contrary to Illinois law. " '[S]ubject matter jurisdiction' refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs." *Belleville Toyota*, 199 Ill. 2d at 334. If the trial court had subject matter jurisdiction over plaintiff's claims against East Gate, then it had subject matter jurisdiction over the claims against

Royal. See *Shipley v. Hoke*, 2014 IL App (4th) 130810, ¶ 73 ("On appeal, plaintiff correctly notes that the court could not, as a matter of law, have lacked subject-matter jurisdiction as to only one of several parties. Instead, '[u]nlike the issue of jurisdiction over the person, subject-matter jurisdiction is not subject to division or apportionment. It either exists or it does not.' " (quoting *O'Connell v. Pharmaco, Inc.*, 143 Ill. App. 3d 1061, 1067 (1986))).

¶ 25 Relying on *Robinson v. Human Rights Commission*, 201 Ill. App. 3d 722 (1990), and *Schaefer v. Human Rights Commission*, 173 Ill. App. 3d 862 (1988), Royal asserts that, "[i]f the Plaintiff felt that Royal Management Corporation was a joint employer, jurisdictionally he was obligation [*sic*] to name them in the Illinois Department of Human [*sic*] Charge." It is not apparent why Royal believes that these cases support its argument that the trial court here lacked jurisdiction, as neither case involved a joint-employer situation. (Royal did not bother to provide pincites to these authorities either.) In *Robinson*, the IHRC lacked jurisdiction to consider a certain charge that was filed more than 180 days after the plaintiff's termination, because that charge did not relate back to the original charge. *Robinson*, 201 Ill. App. 3d at 724, 731. *Schaefer* was a consolidated appeal arising out of two separate orders of the IHRC. The appellate court held that it lacked jurisdiction to consider one of the plaintiff's appeals, because he did not file that appeal in the proper forum within the 35-day period allowed by law. *Schaefer*, 173 Ill. App. 3d at 865-66. With respect to the plaintiff's second appeal, the appellate court held that the IHRC properly denied the plaintiff's motion to amend the original final administrative order, because the plaintiff failed to seek rehearing before the IHRC within 30 days of that order. *Schaefer*, 173 Ill. App. 3d at 866. These cases bear no factual similarities to the present case and do not support Royal's argument that the trial court here lacked subject matter jurisdiction.

¶ 26 For the reasons stated, we reverse the order granting Royal's motion to dismiss.

¶ 27 In closing, we feel compelled to comment on plaintiff's accusations that Royal's counsel committed professional misconduct by failing to disclose to the administrative tribunal that "Eastgate Manor" was not an actual legal entity. Throughout his brief, plaintiff repeatedly attributes nefarious motives to opposing counsel (*e.g.*: "It seems clear that Royal Management Corporation knew that if it kept its true identity hidden until the administrative clock had run, it would circumvent the subsequent legal process at the trial court level. This is, on a moral and policy level, an improper way to represent a defendant."). We note that attorney Debboli filed documents on behalf of "Eastgate Manor" without bringing it to the attention of plaintiff or the administrative tribunal that the respondent had been improperly designated in the charge. But Debboli does not deserve all of the blame for the unnecessary confusion in the record. Although plaintiff filed the charge *pro se*, when he subsequently procured counsel, his attorney might reasonably have recognized that "Eastgate Manor" was not a correct legal name and further investigated. It seems that nobody paid much attention to the issue of corporate formalities until plaintiff filed suit in the circuit court. We remind both counsel of their obligations as officers of the court.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of McHenry County is reversed.

¶ 30 Reversed.